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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ELIAS SERDA DIAZ, Defendant and Appellant.	F076508 (Super. Ct. No. BF168216A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Craig Phillips, Judge.

Martin Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and Franson, J.

A jury convicted appellant Elias Serda Diaz of resisting an executive officer by force (Pen. Code,[1] § 69). In a separate proceeding, the court found true two prior prison term enhancements (§ 667.5, subd. (b)).

On October 25, 2017, the court sentenced Diaz to an aggregate five-year local term, the upper term of three years on the substantive offense and two one-year prior prison term enhancements.

On appeal, Diaz contends the court prejudicially erred by its failure to instruct the jury on simple assault. We affirm.

FACTS

On May 6, 2017, at approximately 10:44 a.m., at the Kern County Sheriff's Central Receiving Facility in Bakersfield, Deputy Josem Alvarez opened the door to the cell where Diaz was housed to put inmate Eric Arrellano in there. Diaz stepped back, but he then started punching Arrellano, and pursued him out of the cell. Alvarez radioed the code for inmates fighting and tried to separate them. As he pulled Arrellano out of the way with his left arm, Diaz struck Alvarez on the left side of his face. Alvarez pushed Diaz against a wall and they both fell on top of some chairs with Alvarez on top of Diaz. Diaz kept resisting as Alvarez told him to stop as he attempted to grab Diaz's left hand to place him in a control hold. Other deputies arrived, but Diaz continued to resist and Alvarez continued to tell him to stop resisting and to put his hands behind his back. In order to control Diaz, the deputies moved him, face down, to the floor, but Diaz continued to resist by placing his hands under his torso and attempting to lift up and by kicking his legs. Alvarez warned Diaz twice to stop resisting or he was going to be tased. When Diaz failed to comply, Alvarez tased him on his back. Diaz placed his right hand in the area of his body where the Taser touched him, which allowed the deputies to take

[1] All statutory references are to the Penal Code, unless otherwise noted.

control of that hand. Diaz was again warned to stop resisting or he would be tased. Diaz did not comply and Alvarez tased Diaz a second time on his back. Diaz placed his left hand where the Taser contacted his body, which allowed the deputies to handcuff Diaz and get him under control.

Several officers testified during the trial and two videos were introduced into evidence. One video showed the inside of the cell where Diaz was housed and the initial part of the altercation with Diaz. The second video showed the area outside the cell and the remaining part of the altercation which lasted approximately three minutes. Five photographs of Diaz that were taken after the altercation were also introduced into evidence. They showed that Diaz received a slight injury to his lower lip, a small scratch or cut above one eye and four red marks on his back that were caused by the Taser coming in contact with Diaz's skin. They did not, however, show that Diaz suffered any significant injuries. Diaz did not testify.

DISCUSSION

Diaz contends simple assault (§ 240) is a lesser included offense of a violation of section 69 because he was prosecuted and convicted of violating section 69 under the forcible resistance prong of that section. He further contends that when a defendant uses unreasonable force in response to the use of unreasonable force by an officer, the defendant's conduct amounts to a simple assault. Thus, according to Diaz, because the video footage and photographs of his injuries could have led the jury to believe the officers used excessive force in subduing him, the court erred by its failure to instruct the jury sua sponte on simple assault. We disagree.

"[Section 69] sets forth two separate ways in which [the] offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an

officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.).

The information charged Diaz, in the disjunctive form, of violating section 69 under both theories, i.e., that he "did willfully and unlawfully attempt by means of threat or violence to deter or prevent" the deputies from performing their duties "or did knowingly resist by the use of force or violence said" deputies. However, during the trial, the prosecutor advised the court she was proceeding only on the second theory, the jury was instructed only on that theory, and the verdict form allowed the jury to convict Diaz of violating section 69 only under the second theory, i.e., by forcibly resisting the deputies.

"Two tests have traditionally been applied in determining whether an uncharged offense is necessarily included within a charged offense—the statutory or legal 'elements' test and the 'accusatory pleading' test. 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.' " (*People v. Sloan* (2007) 42 Cal.4th 110, 117.)

"[A]ssault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Because a person can violate section 69 under the first theory without necessarily attempting to apply physical force, assault is not a lesser included offense of section 69 under the statutory elements test. (*People v. Brown* (2016) 245 Cal.App.4th 140, 152 (*Brown*).) However, since it is not possible to violate section 69 in the second way without committing an assault, assault is a necessarily included offense of section 69 under the accusatory pleading test, if the accusatory pleading charges the defendant with both ways of violating section 69 in the conjunctive. (*Brown*, *supra*, at p. 153.)

Respondent contends that because the information charged Brown with violating section 69 under both theories in the disjunctive, assault was not a lesser included offense of a violation of section 69 here. (Cf. *People v. Barrick* (1982) 33 Cal.3d 115, 135 [joyriding in violation of section 499b not a lesser included offense of Vehicle Code section 10851 under the elements test because it alleges that a person violates that section "by driving *or* taking a vehicle"].)

Logically, it seems to follow that, notwithstanding the language of the information, if the prosecutor elects to proceed only under the second theory of violating section 69 and the jury is instructed only on that offense, as occurred here, assault is a lesser included offense of the charged violation of section 69. However, we need not resolve this issue because even assuming that assault was a lesser included offense of section 69, here, we reject Diaz's claim of instructional error.

" '[I]nstructions on lesser included offenses "are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could ... conclude[ ]" ' that the lesser offense, but not the greater, was committed. [Citations.]" [Citation.] Instructions on lesser included offenses should be given "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." ' " (*Brown*, *supra*, 245 Cal.App.4th at p. 153.)

" '[W]hen excessive force is used by a defendant in response to excessive force by a police officer ... defendant [may] be convicted, and then the crime may only be a violation of section 245, subdivision (a) or of a lesser necessarily included offense within that section,' such as section 240." (*Brown*, *supra*, 245 Cal.App.4th at p. 155.)

Defense counsel did not argue during closing arguments that the officers used excessive force in subduing Diaz. Further, there is nothing in the testimony of the

officers or in the videos or pictures introduced into evidence from which a reasonable jury could conclude that the officers used excessive force to subdue Diaz. Thus, we conclude that even if assault was a lesser included offense of section 69 here, as Diaz contends, the court did not err by its failure to instruct the jury on assault because it was not warranted by the evidence.

DISPOSITION

The judgment is affirmed.